Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA))

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO KCH Q-01(NCVC)(A)-384–12 OF 2015
ZAWAWI SALLEH, ABDUL RAHMAN SEBLI AND ABDUL KARIM JJCA
19 DECEMBER 2017

Civil Procedure — Judicial review — Certiorari — Application for — Minister's decision that society unlawful — Application by society to quash Minister's decision — Whether decision justified and supported by evidence — Whether decision reasonable — Whether decision reviewable — Societies Act 1966

The respondents were committee/office-bearers of Sarawak Association for People's Aspiration ('SAPA'), a society registered under the Societies Act 1966 ('the Act'). The first, second and third respondents were SAPA's president, deputy president and assistant secretary, respectively. The first appellant declared SAPA as an illegal society pursuant to s 5 of the Act. Following the decision, SAPA was de-registered. Aggrieved, the respondent filed for an application for a judicial review at the High Court and sought, inter alia, a certiorari order to quash the decision on the ground that: (a) the decision struck at the very tenets of democracy and fundamental civil liberties such as freedom of speech and expression, freedom of thought and freedom of association guaranteed by the Federal Constitution; (b) the decision was unjustified; and (c) the decision was illegal, unreasonable and/or irrational or based on procedural impropriety. In response, the first appellant denied all the respondents' allegations and argued that he has considered all the relevant facts and exercised the power provided under s 5 of the Act in declaring SAPA and unlawful society. The High Court allowed the application and hence this appeal. The appellants submitted that the High Court judge erred in fact and in law in: (i) deciding that the first appellant's decision was unreasonable and/or irrational even though there were sufficient evidence to justify the first appellant's decision; (ii) deciding that the first appellant had not proved any untoward incidents to the activities involving SAPA; (iii) usurping the power of the first appellant in relation to the matters pertaining to the national security as provided under s 5 of the Act; (iv) quashing the decision of the first appellant even though the said decision was in compliance with s 5 of the Act; and (v) holding that the respondents ought to be given the right to be heard even

A though there was no such right provided under s 5 of the Act.

Held, dismissing the appeal:

(1) Under the subjective test, the exercise of discretion by the Minister is not
B open to review. The court could not enquire about the grounds and the facts justifying the Executive's decision. In contrast, under the objective test, the exercise of discretion is reviewable by a court of law and the executive has to satisfy the court that there are objective facts justifying the executive decision. The test applicable to review the decision of the
C Minister under s 5 of the Act was the objective test and not the subjective test (see paras 31 & 35).

(2) According to the first appellant, there were police reports lodged against SAPA with regard to the activities of SAPA. However, the police report relied upon by the first appellant was neither collectively nor
D singularly-produced that the result that SAPA and their activities had compromised the interest of the security of Malaysia and public order. From the reports, it was clear that the gathering organised by SAPA were peaceful and under the watchful eyes of the police and with no untoward incidents (see paras 42 & 45).

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(3) There was no evidence to suggest that SAPA was a 'secessionist' group. The first appellant's decision which declared SAPA as unlawful was unreasonable because it was fundamentally at variance with reason and common sense (see paras 52–53).

F (4) Section 5 of the Act does not impose a statutory duty on the first appellant to afford the respondents an opportunity to be heard. However, the trend of law has been towards increased recognition of the duty upon the decision-makers to afford an opportunity to be heard before making any adverse decision against the person concerned. This trend is
G consistent with current development towards an increased openness in the matter of government and administration (see paras 56–57).

[Bahasa Malaysia summary

H Responden-responden adalah ahli jawatankuasa/pemegang-pemegang jawatan Sarawak Association for People Association ('SAPA'), satu pertubuhan berdaftar di bawah Akta Pertubuhan 1966 ('Akta'). Responden pertama, kedua dan ketiga adalah presiden, timbalan presiden dan pembantu setiausaha SAPA. Perayu pertama mengisytiharkan SAPA pertubuhan tidak sah di bawah s 5 Akta. Terkilan, responden memfailkan permohonan bagi semakan kehakiman
I di Mahkamah Tinggi dan memohon, antara lain, satu perintah certiorari untuk membatalkan keputusan tersebut atas alasan bahawa: (a) keputusan ini satu pukulan pada rukun asas demokrasi dan hak-hak asasi sivil seperti kebebasan bercakap dan mengeluarkan fikiran, kebebasan berfikir dan kebebasan berpersatuan seperti yang dijamin oleh Perlembagaan Persekutuan; (b)

keputusan tersebut tidak wajar; (c) keputusan tersebut tidak sah, tidak munasabah dan/atau tidak rasional atau berasaskan ketidakaturan prosedur. Sebagai balasan, perayu pertama menafikan kesemua dakwaan-dakwaan responden-responden dan menghujahkan dia telah mempertimbangkan kesemua fakta-fakta relevan dan menjalankan kuasa yang diperuntukkan di bawah s 5 Akta dalam mengisytiharkan SAPA pertubuhan tidak sah. Mahkamah Tinggi membenarkan permohonan tersebut dan oleh itu, rayuan ini. Perayu-perayu menghujahkan bahawa hakim Mahkamah Tinggi terkhilaf secara fakta dan undang-undang dalam: (i) memutuskan keputusan perayu pertama tidak munasabah dan/atau tidak rasional walauapun terdapat keterangan yang mencukupi untuk mewajarkan keputusan perayu pertama; (ii) memutuskan perayu pertama gagal membuktikan insiden-insiden yang tidak diduga berkenaan aktiviti-aktiviti melibatkan SAPA; (iii) melangkaui kuasa perayu pertama dalam hal-hal berkenaan keselamatan negara seperti yang diperuntukkan di bawah s 5 Akta; (iv) membatalkan keputusan perayu pertama walaupun keputusan mematuhi s 5 Akta; dan (v) memutuskan responden-responden patut diberi hak didengar walaupun hak sedemikian tidak diperuntukkan di bawah s 5 Akta.

Diputuskan, menolak rayuan:

(1) Bahawa ujian subjektif, penjalanan budi bicara Menteri tidak boleh disemak. Mahkamah tidak boleh mempersoalkan alasan-alasan dan fakta-fakta yang mewajarkan keputusan badan Eksekutif. Sebaliknya, bawah ujian objektif, penjalanan budi bicara ini boleh disemak melalui mahkamah undang-undang dan badan Eksekutif perlu memuaskan mahkamah bahawa terdapat fakta-fakta objektif yang mewajarkan keputusan badan Eksekutif. Ujian yang terpakai untuk menyemak keputusan Menteri di bawah s 5 Akta adalah ujian objektif dan bukan ujian subjektif (lihat perenggan 31 & 35).

(2) Menurut perayu pertama, terdapat laporan polis yang dibuat terhadap SAPA berkenaan aktiviti-aktiviti SAPA. Walau bagaimanapun, laporan polis yang menjadi sandaran perayu pertama tidak dibuat secara kolektif atau dikeluarkan sekali bahawa keputusan SAPA dan aktiviti-aktivitinya mengkompromi kepentingan keselamatan Malaysia dan ketenteraman awam. Berdasarkan laporan-laporan jelas bahawa perhimpunan yang dianjurkan oleh SAPA aman dan bahawa kawasan pihak polis dan tanpa insiden-insiden yang tidak diduga (lihat perenggan 42 & 45).

(3) Tiada keterangan yang mencadangkan SAPA adalah kumpulan 'pemisah'. Keputusan perayu pertama yang mengisytiharkan SAPA tidak sah adalah tidak munasabah kerana jelas bertentangan dengan akal dan penakulan (lihat perenggan 52–53).

(4) Seksyen 5 Akta tidak mengenakan tanggungjawab statutori pada perayu pertama untuk memberi responden-responden peluang didengar. Walau

bagaimanapun, aliran semasa undang-undang adalah ke arah peningkatan pengiktirafan tanggungjawab ini oleh pembuat-pembuat keputusan untuk memberi peluang untuk didengar sebelum membuat keputusan bertentangan terhadap orang berkenaan. Gaya aliran ini selaras dengan pembangunan masa kini terhadap peningkatan keterbukaan dalam hal-hal perkara kerajaan dan pentadbiran (lihat perenggan 56–57).]

Notes

For cases on certiorari, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6018–6019.

Cases referred to

Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223, CA (refd)

Chng Suan Tze v Minister for Home Affairs & Ors and other appeals [1988] 1 SLR 132; [1988] SGCA 16, CA (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)

Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia) [2012] 6 MLJ 340; [2012] 9 CLJ 297, CA (refd)

Denis O'Keeffe v An Bord Pleanála and Francis O'Brien, Defendants, and The Attorney General, Notice Party (and before the Supreme Court, Radio Tara Ltd) [1993] 1 IR 39, HC (refd)

District Plantation Services Sdn Bhd v Ahmad Nazir bin Adnan & Anor [2000] MLJU 541; [2001] 1 CLJ 25, HC (refd)

Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia [1969] 2 MLJ 129, FC (refd)

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563; [2017] 2 CLJ 1, FC (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789, SC (refd)

Liversidge v Anderson [1941] UKHL 1; [1942] AC 206, HL (refd)

Meadows v Minister for Justice Equality and Law Reform and others [2010] IESC 3, SC (refd)

Minister for Immigration and Ethnic Affairs v Guo Wei Rong [1997] 191 CLR 559, HC (refd)

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)

National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower [1980] 2 MLJ 189, FC (refd)

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah [2004] 2 CLJ 777, FC (refd)

Ong Ah Hooi v Pentadbir Tanah Larut, Matang dan Selama & Anor [2017] 2

MLJ 256; [2017] 6 CLJ 228, CA (refd)
The State (at the Prosecution of John Keegan and Eoin J Lysaght) v The Stardust Victims' Compensation Tribunal [1986] IR 642, HC (refd)
Tan Seet Eng v Attorney-General and another matter [2016] 1 SLR 779; [2015] SGCA 59, CA (refd)
Teh Cheng Poh alias Char Meh and Public Prosecutor, Malaysia Respondent (on appeal from the Federal Court of Malaysia) [1980] AC 458, PC (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765, FC (refd)

Legislation referred to

Societies Act 1966 s 5
Internal Security Act 1960

Appeal from: Application for Judicial Review No KCH-13NCVC-2/1 of 2015 (High Court, Kuching)

Maisarah Juhari (Senior Federal Counsel) for the appellants.
Dominique Ng (Dominique Ng & Assoc) for the respondents.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court of Sabah and Sarawak at Kuching (Rhodzariah Bujang J (as she then was), presiding) dated 30 October 2015, granting the respondents' application, inter alia, for an order of certiorari to quash the first appellant's order dated 14 November 2014 which declared the Sarawak Association For Peoples' Aspiration ('SAPA') an unlawful and/or illegal society with costs of RM8,000.

[2] After hearing the parties, we dismissed the appeal and affirmed the decision of the learned High Court judge. We now give our reasons.

BACKGROUND FACTS

[3] The background facts relating to this appeal have been set out in the grounds of judgment of the learned High Court judge. We do not propose to repeat them in entirety, save to highlight the facts that are germane to the appeal.

[4] The respondents are committee/office bearers of SAPA. The first respondent, Soo Lina, is SAPA's president, Hugh Lawrence Zehnner its deputy president, and Tambi ak Pilang its assistant secretary.

[5] SAPA is a human rights society which has been registered under the Societies Act 1966 ('Act 335') on 12 November 2013.

[6] As stated in cl 3 of its Constitution, SAPA's objectives are as follows:

(a) to uphold and promote universal respect for, and observance of human rights and fundamental freedoms as enshrined in the United Nations Universal Declaration of Human Rights;

(b) to defend the right of every Sarawakian to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and other social services;

(c) to defend the right to education for every Sarawakian irrespective of race, creed, gender, language, religion, social origin, birth or other status;

(d) to support and empower communities working for peace and justice, indigenous and human rights, democracy and gender equality;

(e) to initiate and support community programmes for the eradication of poverty;

(f) to provide a forum for like-minded citizens to exchange ideas and experiences;

(g) to accept from government, purchase, take on lease or in exchange or otherwise occupy or acquire any land or building for the attainment of the objectives of the Association; and

(h) any other initiatives to enhance the progress, empowerment and holistic development of the people of Sarawak.

[7] The main activities of SAPA since its inception are to promote human rights education, especially Sarawakian rights. In this respect, public talks and forums are held which touch on the history of Sarawak, the formation of Malaysia and the Malaysia Agreement. All SAPA forums and other activities are open to the public.

[8] The first appellant (Minister of Home Affairs) had declared SAPA as an illegal society pursuant to s 5 of Act 335 via a federal government *gazette* published on 14 November 2014. The first appellant was of the opinion that 'SAPA is being used for the purposes prejudicial to the interest of the security of Malaysia and public order'.

[9] SAPA was deregistered following the said decision.

[10] Aggrieved with the impugned decision, the respondents filed an application for a judicial review and sought, inter alia, an order for certiorari to quash the impugned decision, costs and other reliefs deemed fit by the court. **A**

[11] The nub of the respondents' contention is that the impugned decision struck at the very tenets of democracy and fundamental civil liberties ie freedom of speech and expression, freedom of thought and freedom of association guaranteed by the Federal Constitution. **B**

[12] The respondents further contended that the impugned decision is totally unjustified. According to the respondents, SAPA never carried out any activities or was being 'used for the purposes prejudicial to the interest of the security of Malaysia and public order'. **C**

[13] The respondents posited that the impugned decision is illegal, unreasonable and/or irrational, or based on procedural impropriety which is amenable to judicial review. **D**

[14] In response, the first appellant vide affidavit in reply dated 11 May 2015 denied all the allegations put forward by the respondents and stated that he had considered all the relevant facts and exercised the power provided under s 5 of Act 355 judiciously in declaring SAPA an unlawful society. **E**

[15] As alluded to earlier, the learned High Court judge found in favour of the respondents and allowed the respondents' application with costs of RM8,000 to the respondents. **F**

[16] Being dissatisfied the decision, the appellants appealed to this court. Hence, this appeal before us. **G**

THE APPEAL

[17] The appellants assail the decision of the learned High Court judge on the following grounds: **H**

(a) the learned High Court judge had erred in fact and in law when Her Ladyship had decided that the first appellant's decision is unreasonable and/or irrational even though there are sufficient evidence on record to justify the first appellant's decision; **I**

(b) the learned High Court judge had erred in law and in fact when Her Ladyship decided that the first appellant had not proved any untoward incidents to the activities involving the SAPA when the first appellant made his decision under s 5 of Act 335;

(c) the learned High Court judge had erred in law when Her Ladyship usurping the power of the first appellant in relation to the matters pertaining to the national security as provided under s 5 of Act 335; and

(d) the learned High Court judge had erred in law when Her Ladyship quashed the decision of the first appellant dated 14 November 2014 even though the decision arrived by the first appellant is in compliance with s 5 of Act 335.

DISCUSSION AND DECISION

[18] Learned senior federal counsel appearing for the appellants opened her case by reminding us of some elementary principles of administrative law that a court undertaking judicial review of an administrative decision is concerned only with the legality of the decision and not with its merits (see *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9).

[19] Learned senior federal counsel emphasised that it is the duty of the court to guard against any tendency to 'trespass into the forbidden field of review of the merits' (see *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* [1997] 191 CLR 559 at p 577; *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189).

[20] Learned senior federal counsel vigorously argued that it is not for the court to substitute its view for the Minister's as to whether SAPA is being used for the purposes prejudicial to the interest of the security of Malaysia and public order.

[21] Learned senior federal counsel further submitted that this instant appeal involves considerations of security and public order. These are areas that on their face are within the province of the Executive branch of government (the first appellant). The Judiciary should accord deference to another branch of government in relation to a subject matter that is more comfortably situated within the latter's province.

[22] In support of her submission, learned senior federal counsel relied on *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 MLJ 129 where the learned judges sitting in the Federal Court stated as follows:

> Azmi LP (p 140 para A–B):
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> Finally I wish to quote the following the judgment of *Lord Macmillan in Liversidge v Sir John Anderson & Anor* [1942] AC 206 at p 253:
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> > But how could a court of law deal with the question whether there was a reasonable cause to believe that it was necessary to exercise control over the

person proposed to be detained, which is a matter of opinion and policy, not of fault? A decision on this question can manifestly be taken by one who has both knowledge and responsibility which no court can share.

Ong Hock Thye CJ (Malaya) (p 142 para H):

Once we accept that the Cabinet did satisfy themselves as to the propriety of the order that is the end of the matter.

Suffian FJ (p 150 para E–G):

In this matter with respect I agree with the reasoning of the minority judgment by Sastri J in Atma Ram AIR 1951 SC 157 that when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation.

And at p 151 para E–G:

Finally, in my opinion, it is not for a court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him. The discretion whether or not the appellant should be detained is placed in the hands of the Yang di Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the Executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.

Gill FJ (p 154 para B–C):

There is ample authority for the proposition that it is not the function of the court to act as a court of appeal from the discretionary decision of the Cabinet and to inquire into the grounds upon which they came to the belief that it was necessary or desirable in the interests of the security of Malaysia to hold the appellant in detention.

Ali FJ (p 159 para B–D):

Lastly, there is also the appellant's affidavit in which he categorically denies each and every one of the allegations of fact and contends in each case that even if the allegation is true, it cannot constitute a threat to the past or future security of Malaysia. In this connection, I shall be content to say that in habeas corpus proceedings, such as this, the court is not concerned with the truthfulness or otherwise of the allegations because the question whether it is necessary that a person be detained under s 8(1)(a) of the Internal Security Act, 1960 is a matter for the personal or subjective satisfaction of the Executive authority. Accordingly, no consideration can be given to the appellant's denial and no opinion need be expressed on his consideration.

[23] Learned senior federal counsel posited that courts and judges are not best — equipped to scrutinise the decision which are laden with issues of policy or security or which call for polycentric political considerations. Court and judges are concerned rather with justice and legality in the particular case that come before them.

[24] With respect, we disagree with the submission. The current state of law on judicial review in Malaysia permits a review of process and merit. In *Ong Ah Hooi v Pentadbir Tanah Larut, Matang dan Selama & Anor* [2017] 2 MLJ 256; [2017] 6 CLJ 228, this court said:

> [10] In our view, the law on judicial review has developed over the years. In *R Ramachandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, the Federal Court revisited this area of law and laid down crucial new principles to bring our law into harmony with the development in administrative law. The Federal Court stated at pp 186–187:
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> > It is often said that judicial review is concerned not with the decision but the decision making process (see eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
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> > But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, *this permits the courts to scrutinise such decisions not only for process, but also the substance*. (Emphasis added.)
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> [11] The law was clearly explained and clarified by Raus Sharif FCJ (now PCA) in the Federal Court case of *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 where His Lordship said:
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> > Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.
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> [12] In *Datuk Justine Jinggut v Pendaftar Pertubuhan* [2012] 3 MLJ 212, this court reaffirmed the application of the *Ramachandran* principle in the following terms (at para 56):

> The court has the power to scrutinise the authority's decision not only for process, but also for substance (*R Ramachandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147).

[13] In the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; [2014] 8 CLJ 629, the Federal Court held that the current position of the law on judicial review in Malaysia permits a review of process and substance in determining the reasonableness of a decision by an administrative body and the test applicable in judicial review now is the objective test.

[14] We hasten to add that the court is permitted to review the decision on the basis of a material mistake of fact on the part of the person who made the decision or where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper process, or where the functionary misconceived the nature of the discretion conferred upon him or her and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he or she had failed to apply his or her mind to the matter.

[25] In the same vein, the Federal Court in *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1 stated:

[69] A judicial review is a court proceeding where a challenge is made on the decision of the relevant authority or entity (in this case the appellant) ie, by challenging the lawfulness of the decision-making process. This is trite law. Generally, the court dealing with the judicial review application in a supervisory capacity is not to delve into the merits of the case. In other words, the evidence is not reassessed. The court is merely to quash the decision of the relevant authority, if need be, and not to substitute with what it thinks is the correct decision. We are not here to usurp the powers of the designated authority.

[70] Lord Brightman in *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155, at p 1174 had occasion to state that a judicial review 'is not an appeal from the decision but a review of the manner in which a decision is made'. The book authored by Mr Michael Supperstone QC and Mr James Goudie QC in judicial review at p 72, was also referred to, and reads:

> It is easy to understand why this is so. The paradigm case of a Judicial Review challenge arises where a body whose functions are conferred by statute are said to have acted in a manner in which the law does not allow. But if the only complaint is that the body has reached a decision unfavourable to the applicant on the facts, and the claim put forward is a plea to the court in effect to substitute a different decision, the proceedings would amount to an invitation to the court to exercise the very function which statute had confided to the body reviewed; to accede to such an invitation would be to usurp the will of Parliament. Since, of course, Parliament includes the elected element of the legislature, any such stance by the court might reasonably be castigated as undemocratic ...

A [71] However, the Federal Court in the landmark decision of *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 held that the decision of an inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality', which not only permits the courts to scrutinise the decision-making process but also the decision itself. In short, it allows
B the courts to delve into the merits of the matter.

[72] The approach of illegality and irrationality was recognised and applied by *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525. This court in succinct terms said:

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> On the facts of this case, we find MTUC had failed to show that the Minister's decision was illegal, irrational and flawed on the grounds of procedural impropriety.

[73] It is now clear, and here to stay, that the decision of an inferior tribunal may also be reviewed on the grounds of illegality and irrationality. The distinction between a
D review application and an appeal thus appears to no longer exist (see also *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629).

[74] Despite the introduction of the grounds of 'illegality', 'irrationality' and possibly 'proportionality', and the liberal approach, *R Rama Chandran* self-checked itself when it stated at p 197 (MLJ); pp 183–184 (CLJ) that:

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> Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the
F circumstances of the particular case will have to be applied.
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> For example, where policy considerations are involved in administrative decisions and courts do not possess knowledge of the policy considerations which underline such decisions, courts ought not to review the reasoning of the administrative body, with a view to substituting their own opinion on the basis
G of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of power on the part of the courts.

[75] *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2003] 4 CLJ 625, in no uncertain terms said that the reviewing court may scrutinise a decision on its merits
H but only in the most appropriate case. At p 635 we said:

> Clearly therefore, not every case is amenable to the *Rama Chandran* approach. It depends on the factual matrix and/or the legal modalities of the case. This is certainly a matter of judicial discretion on the part of the reviewing judge ...

I (See also *District Plantation Services Sdn Bhd v Ahmad Nazir bin Adnan & Anor* [2000] MLJU 541; [2001] 1 CLJ 25; *Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia)* [2012] 6 MLJ 340; [2012] 9 CLJ 297).

[26] With the above principles in mind, we now proceed to consider the grounds put forward by the appellants.

[27] Learned senior federal counsel submitted that under s 5 of Act 335, the first appellant has absolute discretion to cancel the registration of a society based on the ground that it can affect the national security.

[28] Learned senior federal counsel posited that the learned High Court judge had erred in holding that what is considered to be as national security within the context of the case is amenable to judicial review. In support of her submission, reliance was placed, inter alia, on the case of *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 where the court held at p 97 paras a–b that:

> It seems apparent from these cases that where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the Executive, involving as they invariably do, policy considerations and the like.
>
> If however, the court found itself compelled to intervene, as it had done in the instant case, notwithstanding the ouster clause in s 8B or the cautionary advice I mentioned a moment ago, it must necessarily resolve the important question of whether the objective or the subjective test applies to the exercise of the Minister's discretion under s 8(1) of the ISA. In Malaysia, that question has been answered by the Federal Court in *Karam Singh,* consisting of a strong panel of eminent judges including Ong Hock Thye CJM and Suffian FCJ (as he then was) ...
>
> [23] Further, at p 98 paras f–g, it was held that:
>
> > It is in the light of the principles enunciated in *Karam Singh* that the present case ought to be examined. ... From this, it is immediately clear that the said report related to matters of national security which involved the respondent. The Minister was satisfied that the activities of the respondent threatened national security. That satisfaction was a subjective one. From that perspective, there would be no violation of the principles established in *Karam Singh.*

(See also *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789).

[29] Learned senior federal counsel vehemently argued that the learned High Court judge had erred in probing into the issue of sufficiency or otherwise of the evidence before the first appellant and therefore, had failed to be cautious from turning a judicial review proceedings to an appeal on merit.

[30] Now, s 5 of Act 335 is in the following terms:

> Power of the Minister to declare s society unlawful.
>
> (1) It shall be lawful for the Minister *in his absolute discretion* by order to declare unlawful any society or branch or class or description of any societies which *in his*

A *opinion*, is or is being used for purposes prejudicial to or incompatible with the interest of the security of Malaysia or any part thereof, public order or morality. (Emphasis added.)

B **[31]** It is trite that under the subjective test applied in *Karam Singh*, the exercise of discretion by the Minister is not open to review. The court cannot enquire about the grounds and the facts justifying the Executive's decision. In contrast, under the objective test, the exercise of discretion is reviewable by a court of law and the Executive has to satisfy the court that there are objective facts justifying the Executive's decision.

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[32] This latest statement of the law was pronounced by Federal Court in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765 where the court stated:

D [27] Having considered the issue at hand, I agree with learned counsel for the applicant that the law on judicial review had advanced from the subjective test to that of the objective test ...

As laid down by the above authority it is *therefore trite that the test applicable in judicial review is the objective test*. (Emphasis added.)

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[33] It is interesting to note that in *Chng Suan Tze v Minister for Home Affairs & Ors and other appeals* [1988] 1 SLR 132; [1988] SGCA 16 ('Chung Suan Tze'), the Court of Appeal of Singapore rejected the application of the subjective test in favour of the objective test on the following grounds:

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(a) firstly, the court held that *Karam Singh* and other cases following it were no longer good law in so far as they applied *Liversidge v Anderson* [1941] UKHL 1; [1942] AC 206, which were World War II cases from the United Kingdom. The House of Lords and Privy Council had since recognised that the majority judgments in *Liversidge* had been wrong and preferred Lord Atkin's dissenting judgment in *Liversidge* which advocated the objective approach;

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(b) secondly, the court concurred with judicial opinion expressed in other Commonwealth jurisdictions that courts can objectively review the Executive's exercise of discretion in the context of preventive detention on national security grounds;

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(c) thirdly, applying the subjective test in reviewing the exercise of discretion under the ISA would mean giving the Executive arbitrary powers of detention, rendering such powers unconstitutional and void; and

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(d) fourthly, support for the applicability of the objective test was found in *Teh Cheng Poh alias Char Meh and Public Prosecutor, Malaysia Respondent (on appeal from the Federal Court of Malaysia)* [1980] AC 458, a Privy

Council decision on appeal from Malaysia, in which it was held that 'as with all discretions conferred upon the Executive by the Act of Parliament, (the Malaysia ISA) does not exclude the jurisdiction of the courts to inquire the purported exercise of the discretion was never ultra vires either because it was done bad faith or because as a result misconstruing the provisions of the Act'.

[34] On the approach adopted by *Chung Suan Tze*, the Court of Appeal of Singapore in *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779; [2015] SGCA 59 had this to say at paras 98–99:

98. It is true that *Chng Suan Tze* was subsequently legislatively overruled by amendments to the Constitution and the ISA (see *Teo Soh Lung* (CA) at [20]–[21] which confirmed that the post-amendment position was that stated in *Lee Mau Seng* at [53], but those amendments do not affect the position before us because we are not concerned with the ISA. In our judgment, the following propositions flow from the foregoing passage in *Chng Suan Tze,* and continue to be relevant to this case:

(a) Unfettered discretion is contrary to the rule of law. All power has legal limits and it is within the province of the courts to determine whether those limits have been exceeded.

(b) It follows that if discretion is vested in the Executive branch by the Legislature, it remains a matter for the courts to decide:

(i) what the boundaries are of the jurisdiction or power that is vested in the Executive; and

(ii) whether the Executive has acted within the ambit of that jurisdiction or power.

(c) The follows also by reason of Art 93 of the Constitution, which vests the judicial power in the courts.

(d) Therefore, the courts, in the final analysis, are the arbiters of the lawfulness of actions including government actions.

99. Where the Executive is acting within the ambit of the powers that have vested in it by Parliament, then the court's concern is not with whether it agrees with the way in which the powers have been exercised. To suggest otherwise is to displace the choice that has been made by Parliament as to which branch of the government is to be entrusted with the powers in question. The court's role in judicial review which engages the manner in which the power is exercised will then be limited to such things as illegality, irrationality and procedural impropriety. This perspective is premised on a proper understanding of the role of the respective branches of government — especially, in this context, the Executive and the Judiciary — in a democracy where the Constitution reigns supreme.

[35] Based on the authorities above, it is clear that the test applicable to review the decision of the Minister under s 5 of Act 355 is the objective test and not the subjective test.

[36] We now turn to consider the impugned decision within the ambit of '*Wednesbury* unreasonableness'. The case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 came to be regarded as an authoritative statement of the standard of legal unreasonableness imposed on decision — makers exercising discretionary powers. In his often cited judgment, Lord Greens MR stated:

> The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to have taken into account or conversely have refused ... or neglected to take into account matters which they ought to have taken into account. Once that question is answered in favour of the local authority, it may still be possible to say that ... they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case I think the court can interfere.

[37] The invocation of unreasonableness as a ground of judicial review has often been controversial because it is such a subjective concept and opinions can obviously vary widely on whether a particular decision is reasonable or not. Several attempts have been made to reformulate the test. In *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935, Lord Diplock fashioned the principle of unreasonableness and preferred to use the term 'irrationality' as follows:

> By 'irrationality' I mean what can now be succinctly referred to as '*Wednesbury* unreasonableness'... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[38] In *Tan See Eng*, the Singapore Court of Appeal opined that 'illegality' and 'irrationality' are separate and serve a different purpose. The court said at para 80:

> 80 In our judgment, illegality and irrationality are separate, though overlapping, heads of review because at their core, each serves a different purpose. A decision may be legal in the sense that it is within the legislative scheme, but nevertheless impugned for being substantively unlawful (Thio Li-ann, 'Law and the Administrative State' in The Singapore Legal System (Kevin YL Tan ed) (Singapore University Press, 2nd Ed 1999) ('Law and the Administrative State') at p 185). This is because illegality serves the purpose of examining whether the decision-maker has exercised his discretion within the scope of his authority and the inquiry is into whether he has exercised his discretion in good faith according to the statutory purpose for which the power was granted, and whether he has taken into account irrelevant considerations or failed to take account of relevant considerations (Harry Woolf et al, De Smith's Judicial Review (Sweet & Maxwell, 7th Ed, 2013) ('De Smith's Judicial Review') at para 5-001). Conversely, irrationality is a more substantive enquiry which seeks to ascertain the range of legally possible answers and asks if the decision made is one which, though falling within that range, is so absurd that no reasonable decision-maker could have come to it (see *Law and the*

Administrative State at p 186). In short, illegality examines the source and extent of the Minister's power and whether the power has been informed by relevant and only relevant considerations, while irrationality looks at the decision that was made and asks if it was so unreasonable that after considering the correct factors, no reasonable decision-maker could have come to it.

WHAT IS THE MEANING REASONABLENESS IN JUDICIAL REVIEW?

[39] The test of reasonableness has been the subject of many cases over the decades in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on ground of unreasonableness or irrationality, Henchy J of the Irish Court in *The State (at the Prosecution of John Keegan and Eoin J Lysaght) v The Stardust Victims' Compensation Tribunal* [1986] IR 642 set a number of such circumstances in different terms. They are:

1. It is fundamentally at variance with reason and common sense.
2. It is indefensible for being in the teeth of plain reason and common sense.
3. Because the court is satisfied that the decision-maker has breached his obligation whereby he 'must not flagrantly reject or disregard fundamental reason or common sense in reaching hi decision.

[40] In *Denis O'Keeffe v An Bord Pleanála and Francis O'Brien, Defendants, and The Attorney General, Notice Party (and before the Supreme Court, Radio Tara Ltd)* [1993] 1 IR 39, Finlay CJ said: '[T]he circumstances under which the courts can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare.' A court could not interfere just because it would have come to different conclusions or because 'the case against the decision made by the authority was much stronger than the case for it'. For the court to intervene, 'it is necessary [to establish] ... that the decision-making authority had before it no relevant material which would support its decision'.

[41] In *Meadows v Minister for Justice Equality and Law Reform and others* [2010] IESC 3 Denham J in her dicta (ratio) set out the following test:

> This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. Inter alia, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises inter alia from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, or reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and

not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.

[42] Now, we turn to the facts of this instant appeal. The first appellant deposed in his affidavit-in-reply that there were police reports lodged against SAPA with respect to the activities of SAPA which he claimed were prejudicial to the interest of the security of Malaysia and public order, hence the declaration on its illegality with effect 14 November 2014.

[43] The learned High Court judge had summarised the said police reports in his grounds of judgment and we reproduce the same hereunder:

(i) Kuching Sentral Report No SENTRAL/008390/13 dated 27th December 2013 made by one Abdul Rahman bin Nazirin who complained that Soo Lina was inviting a number of NGOs through the social media to assemble at a ceremony called Sarawak Nationalist Year End Gathering 2013. The complainant alleged that the intention of Lina and her associates was to influence ('menghasut') the people of Sabah and Sarawak to hate the Federal Government who were not fair to the two States and to agitate for the two States to leave Malaysia which action is disruptive of the harmonious relations in the two States. The report is in Bahasa Malaysia and the above summary is my own translation of the same. I noted that the Association was not mentioned in this report.

(ii) Miri Report No MIRI/004047/14 dated 20th April 2014 by a police officer Nagulan a/l Maniam who stated that he was with a group of police personnel supervising an assembly of fifty persons at Taman Awam Miri who were carrying banners 'Sarawak for Sarawakians' and 'July 22nd Sarawak Day — Enhance Immigration Law — Restore English medium — One Race One Dream'. He identified amongst those present was Eric Chin from a political party SUPP Miri and Chong Kon Fat from another political party, STAR. I noted that neither the Association nor the applications or its other members were named in the report.

(iii) Padungan Report No PADUNGAN/001224/14 dated 1st May 2014 by Ramlan bin Hamzah who reported reading an article in a blog of The Malaysian Insiders, where it was allegedly said in a forum organized by the Association that breaches of the Malaysian Agreement has rendered it invalid.

(iv) Kuching Sentral Report No SENTRAL/003919/14 dated 19th July 2014 by a policeman Sim Tiang Khoon against the staging of a 'Sarawak Independent Walk' attended by about 40 to 60 people at Padang Merdeka. The situation was under control, he said. Neither the Association and/or its committee members were mentioned in the report.

(v) Kuching Sentral Report No SENTRAL /003967/14 dated 22nd July 2014 about the gathering of the Association participated by about eighty to one hundred persons carrying placards and gathering signatures who

marched to the old courthouse and assembled infront of the Square Tower. The situation was under control, he said.

(vi) Satok Report No SATOK/4139/14 dated 3rd September 2014 by police officer, Lee Leng Ian on a Face book posting of the Association urging people to attend a briefing on the Malaysia Agreement by Mr. Robert Pei on 7th September 2014 at 2.00 pm which according to him will affect peace and harmony in Sarawak. I noted that there is no follow-up on the said event.

(vii) Miri Report No LUTONG/005095/14 dated 15th September 2014 by a police officer, Mohd Kushaini bin Sulaiman regarding their supervision of the gathering at the Petronas Office, Luthong which was organised by the Association and was attended by about eighty to one hundred people. He mentioned in the report that the slogan 'Sarawak for Sarawakians' was voiced and a number of placards bearing words such as 'No satisfaction with 5%' and 'Bigger Oil and Gas Cake for Sarawak' were displayed. No untowards incident happened at that gathering, he said.

(viii) Miri Report No LUTONG/005095/14 dated 15th September 2014 by the same police officer above on the same incident but at the Shell's office.

(ix) Miri Report No LTBG MIRI/001633/14 dated 16th September 2014 by another police, Tosing ak Dareh regarding a gathering of about thirty persons at Jalan Airport wearing black shirts with the words 'Sarawak for Sarawakians' and bearing banners with words such as 'Bousted — Tanah Sarawak Bukan Milik Nenek Moyang Kamu'. 'Tanah NCR Milik Orang Asal, Bukan Milik Boustead'. 'Hentikan Pencerobohan Terhadap Tanah Kami' and 'Stop Sarawak Dams'. Again, neither the Association not its committee members were mentioned in this report.

[44] After reviewing the above police reports objectively, the learned High Court judge concluded as follows:

> The decision to outlaw the Association is unreasonable for the reasons that the evidence supporting the basis of that decision is severely lacking and the Hon Minister had it appears, considered even police reports of incidents not related to the Association and/or it's committee members, which in itself and with respect is a flaw in the decision making process.

[45] We are in full agreement with the findings of the learned High Court judge that the police reports relied upon by the first appellant neither collectively nor singularly produced that the result that SAPA and their activities had compromised the interest of the security of Malaysia and public order. From the reports, it is clear that the gathering organised by SAPA were indeed peaceful and under the watchful eyes of the police and with no untoward incidents.

A **[46]** The insistence to honour the Malaysia Agreement, the reminder that Sarawak is an equal partners in the formation of Malaysia and to have a fairer share in the oil and gas revenue provided by the state had not been shown to be agitations which disrupted or had potential to disrupt public order or to threaten the security of Malaysia.

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[47] We also agree with the learned High Court Judge that in a democratic country like Malaysia, a mere dissenting voice or a chorus of such voices without more cannot simply be categorised as detrimental to public order and national security.

C

[48] In her supplementary affidavit affirmed on 8 June 2015, the first respondent referred to statements made by Sarawak Minister for Land Development, Tan Sri Datuk Amar James Masing and by the then Chief Minister, Tan Sri Datuk Patinggi Adenan Satem (reported in *Borneo Post* dated 4 June 2015 and 3 June 2015 respectively) where the former reiterated the need to honour the Malaysia Agreement and the latter that Sarawak should be recognised as a component in the formation of Malaysia and not just a state in Malaysia. The first respondent also exhibited a copy of an online report of *Borneo Post* dated 10 November 2013 where the later repeatedly made comments along the same line. The report was headlined 'Masing wants review on state's position in Malaysia Federation'.

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[49] In our view, what SAPA has been saying in its forums basically are what the Chief Minister and other Ministers from Sarawak have also been quoted to have said in the *Borneo Post*.

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[50] The learned High Court judge also referred to the statement of another Sarawak Minister, Datuk Abang Johari Tun Openg (now the Chief Minister of Sarawak) reported on the front page of the *Sunday Post* on 25 October 2015 who had proposed the setting up of a formal committee from both the states and federal government to revisit the Malaysia Agreement. The federal government had agreed with the proposal.

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H **[51]** The highlighted statements in the affidavit in reply of the first respondent were not answered or rebutted by the first appellant and therefore deemed to be admitted.

[52] In the course of hearing submissions from both parties, we put a direct question to learned senior federal counsel as whether there was evidence to show that SAPA was directly or indirectly trying to champion the secession of Sarawak from the Federation of Malaysia. To her credit, learned senior federal counsel candidly conceded that there was no evidence to suggest that SAPA is a 'secessionist' group.

I

[53] For the reasons we have stated above, we are constrained to hold that the first appellant's decision which declared SAPA as unlawful society is unreasonable because it is fundamentally at variance with reason and common sense. There was no evidence to justify the factual conclusion reached by the first appellant.

[54] That, however, it is not the end of the matter. Senior federal counsel complained that the learned High Court judge had erred in law in holding that the respondents ought to be given the right to be heard even though there is no such right provided under s 5 of Act 335.

[55] We agree with the submission. However, it is pertinent to note that it is only an additional ground proffered by the learned High Court judge as Her Ladyship had already decided to grant an order of certiorari to quash the impugned decision/order of made by the first appellant. Her Ladyship addressed the issue in passing as it has been raised by the respondents in their submission. The issue was discussed in order for the completeness of her grounds of judgment.

[56] We agree with learned senior federal counsel that s 5 of Act 355 does not impose a statutory duty on the first appellant to afford the respondents an opportunity to be heard. There cannot be any breach where such rights do not exist in law (see *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] 2 CLJ 777). In the absence of any provision as to the right to be heard in s 5 of Act 355, no question of failure to observe the principal of natural justice could arise.

[57] Having said that we must hasten to add that the trend of law has been towards increased recognition of the duty upon the decision-makers to afford an opportunity to be heard before making any adverse decision against the person concerned. This trend is consistent with current development towards an increased openness in the matter of government and administration. In *Halsbury's Law of England (Judicial Review)* (Vol 61 (2010) 5th Ed), para 639, it stated as follows with respect to the right to notice and opportunity to be heard:

> The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice in itself to attract a duty to comply with this rule ... However, the nature

of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations.

CONCLUSION

[58] For the foregoing reasons, we had concluded that the appeal was bereft of merit and dismissed the same with no order as to costs. So ordered.

Appeal dismissed

Reported by Afiq Mohamad Noor